Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Updating the Intercarrier Compensation	)	WC Docket No. 18-155
Regime to Eliminate Access	)	
Arbitrage	)	

PETITION FOR STAY OF REPORT AND ORDER PENDING APPEAL OF GREAT LAKES COMMUNICATION CORPORATION, NORTHERN VALLEY COMMUNICATIONS, LLC, NO COST CONFERENCE, INC., SIPMEETING, LLC, AND TOTAL BRIDGE, INC.

G. David Carter
John C. Nelson, Jr.
WOMBLE BOND DICKINSON (US) LLP
1200 Nineteenth Street, N.W.
Suite 500
Washington, D.C. 20036
Tel: (202) 857-4593
Fax: (202) 261-0083
Email: David.Carter@wbd-us.com
John.Nelson@wbd-us.com

Counsel to Great Lakes Communication Corporation, Northern Valley Communications, LLC, No Cost Conference, Inc., Sipmeeting, LLC, and Total Bridge, Inc.

Dated: October 4, 2019

REDACTED FOR PUBLIC INSPECTION

TABLE OF CONTENTS

REDACTED FOR PUBLIC INSPECTION

SUMMARY

Great Lakes Communication Corporation ("GLCC"), Northern Valley Communications, LLC ("NVC"), No Cost Conference, Inc. ("NCC"), Sipmeeting, LLC ("Sipmeeting"), and Total Bridge, Inc. ("Total Bridge") (collectively, "Petitioners"), through counsel and pursuant to 47 C.F.R. § 1.43, respectfully seek a stay of the Report and Order and Modification of Section 214 Authorizations in WC Docket No. 18-155, *In the Matter of Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, adopted September 26, 2019, and released September 27, 2019 ("*Access Stimulation Order*"). As fully set forth below, Petitioners more than satisfy all four of the criteria enumerated in *Virginia Petroleum Jobbers Association v. Federal Power Commission*.

First, Petitioners are likely to prevail on the merits of their appeal on any of several independent grounds, including the following:

- The *Access Stimulation Order* imposes two new, alternative tests for determining whether carriers are engaged in "access stimulation," neither of which were raised in the Commission's Notice of Proposed Rulemaking and which were adopted in violation of the notice requirements outlined in the Administrative Procedure Act.

- The *Access Stimulation Order* fails to address record evidence that contravenes its conclusions and justifications for the newly adopted rules, instead implementing rules and policies that are not supported by *any* record evidence and which revert from well-established Commission policy absent a reasoned explanation.

- The *Access Stimulation Order* adopts rules that exceed the Commission's statutory jurisdiction by improperly interfering with states' rights, unreasonably and unlawfully discriminating against rural CLECs and ILECs, and violating the Fifth Amendment's Takings Clause.

Second, Petitioners demonstrate, through the sworn declarations of Joshua Dean Nelson, Chief Executive Officer of GLCC, and James Groft, Chief Executive Officer of NVC, that they will suffer irreparable harm of several types:

- Almost immediately after the *Access Stimulation Order* takes effect, Petitioners will be faced with financial ruin that threatens their very existence, totally depriving them of the very revenue that allows them to barely survive even today.

- As a result of Petitioners' financial ruin, their networks will suffer and their customers – residential, business, and high volume alike – will look elsewhere for competitive, more capable offerings, thereby resulting in a loss of goodwill and market share.

- Due to the Commission's encouragement of IXC "self-policing," and based on the newly adopted rules' language, Petitioners will be subject to multiple, potentially endless disputes with IXCs regarding their terminating-to-originating interstate traffic ratios, imposing further unrecoverable costs on Petitioners.

- Petitioners will be stuck with the Herculean task of revising their tariffs and billing arrangements over a short period of time, taking away more resources from their daily operations and duties to their subscribers and imposing even more unrecoverable costs.

Third, a stay of the *Access Stimulation Order* will not materially harm third parties and in fact would serve their interests. IXCs, whom have yet to substantiate their allegations of harm and whom already regularly do not pay access-stimulating CLECs the tariffed charges they are owed, would be able to continue profiting substantially off of the retail and wholesale access stimulation traffic they deliver. And the customers of IXCs would be able to continue making conference calls to the various service providers that they have relied on for years, while the customers of Petitioners would continue to receive the advanced telecommunications services that they have come to expect.

Fourth, the public interest clearly favors a stay of the *Access Stimulation Order*, as the general public would be gravely impaired if the *Order* became effective. Indeed, with only a brief 75-day implementation window, Petitioners will not have enough time to prepare for the significant call path alterations that are about to occur, resulting in substantial and significant call disruptions and failures to end users nationwide. Petitioners' communities will also suffer (and likely on a greater scale), losing out on job opportunities with call centers and other major

businesses that Petitioners will have to decline service to out of fear of the new access stimulation definitions.

For all these reasons, the Commission should stay the effectiveness of the *Access Stimulation Order* as it applies to Petitioners until the forthcoming appeal from that order is resolved.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage	)	WC Docket No. 18-155
	)	
	)	

PETITION FOR STAY OF REPORT AND ORDER PENDING APPEAL

Great Lakes Communication Corporation ("GLCC"), Northern Valley Communications, LLC ("NVC"), No Cost Conference, Inc. ("NCC"), Sipmeeting, LLC ("Sipmeeting"), and Total Bridge, Inc. ("Total Bridge") (collectively, "Petitioners"), through counsel and pursuant to 47 C.F.R. § 1.43, hereby file this Petition for Stay of the Report and Order and Modification of Section 214 Authorizations in WC Docket No. 18-155, *In the Matter of Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, adopted September 26, 2019, and released September 27, 2019 ("*Access Stimulation Order*"). In support of this Petition, Petitioners file herewith the Sworn Declarations of Joshua Dean Nelson, Chief Executive Officer of Great Lakes Communication Corporation and James Groft, Chief Executive Officer of Northern Valley Communications, LLC. Petitioners also incorporate by reference the Declarations of Thadeus Jay Nelson, Chief Executive Officer of No Cost Conference, Inc., Matthew Alan Bathke, Managing Member of Sipmeeting, LLC; and John J. Hass, Director of Total Bridge, Inc., which were filed alongside an *ex parte* letter submitted in WC Docket No. 18-155 on September 19, 2019.[1] Petitioners request that the *Access Stimulation Order* be stayed pending review to prevent the irreparable harm that would flow from the *Order*'s immediate

[1] *See* Letter from D. Carter, Counsel, CLECs, to M. Dortch, Secretary, FCC, WC Docket No. 18-155 (Sept. 19, 2019) ("CLEC September 19, 2019 *Ex Parte* Letter").

implementation. As fully set forth below, Petitioners more than satisfy the Commission's standard for granting a stay.

Due to the extremely brief implementation deadline in the *Access Stimulation Order*, Petitioners respectfully request that the Commission resolve this Petition and stay the *Access Stimulation Order* with regard to them by **October 18, 2019**, which is **14 days** from the date of this filing. Petitioners do not request that the *Access Stimulation Order* be stayed with regard to any other parties who have not provided evidence to the Commission regarding the harm that the *Order* will have on their companies.

STANDARD FOR ENTERING STAY

The Commission applies the four-part test in *Virginia Petroleum Jobbers Association v. Federal Power Commission*[2] when reviewing petitions for stay pending appeal.[3] Under that test, to support a stay, petitioners must demonstrate: (1) they are likely to prevail on the merits; (2) they will suffer irreparable harm absent a stay; (3) other interested parties will not be harmed by entry of a stay; and (4) the public interest favors a stay.[4] The Commission does not always accord each prong of this test equal weight. Thus, "[i]f there is a particularly overwhelming showing in at least one of the factors, the Commission may find that a stay is warranted notwithstanding the absence of another one of the factors."[5]

---

2 259 F.2d 921, 925 (D.C. Cir. 1958).

3 *See, e.g.*, *In re Protecting the Privacy of Customers of Broadband and Other Telecomm. Servs.*, Order Granting Stay Petition in Part, 32 FCC Rcd. 1793, 1795-96 ¶ 7 (2017) ("*BIAS Privacy Partial Stay Order*") (citing *Va. Petroleum Jobbers Ass'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)); *In re Telecomms. Relay Servs. and Speech-to-Speech Servs. for Individuals with Hearing and Speech Disabilities*, Order, 23 FCC Rcd. 1705, 1706-07 ¶ 4 (2008) ("*TRS Services Stay Order*") (same); *In re Charter Commc'ns Entm't I, LLC*, Memorandum Opinion and Order, 22 FCC Rcd. 13890, 13892 ¶ 4 (2007) (same).

4 *See BIAS Privacy Partial Stay Order*, 32 FCC Rcd. at 1795-96 ¶ 7.

5 *TRS Services Stay Order*, 23 FCC Rcd. at 1707 ¶ 4.

BACKGROUND

On September 26, 2019, at its September Open Meeting, the Commission voted to adopt new regulations for access-stimulating competitive local exchange carriers ("CLECs") and rate-of-return incumbent local exchange carriers ("ILECs") (collectively, the "access-stimulating LECs") by a 5-0 vote. Subsequently, on September 27, 2019, the Commission released the *Access Stimulation Order*, which requires those CLECs and ILECs that meet the Commission's expanded "access stimulation" definition to be financially responsible for the tariffed tandem switching and transport charges associated with the delivery of traffic from an interexchange carrier ("IXC") to the access-stimulating LEC's end office (or functional equivalent). The new regulations will be codified in Parts 51, 61, and 69 of the Commission's Rules. They include:

1. Revised Financial Responsibility for Access-Stimulating LECs (Part 51)

Under the *Access Stimulation Order*, if a CLEC or ILEC is engaged in "access stimulation," as defined in Section 61.33(bbb) of the Commission's Rules, that LEC must, within 45 days of commencing access stimulation or within 75 days of the rule's promulgation in the *Federal Register*, whichever is later, assume financial responsibility for those charges associated with terminating switched access tandem switching and terminating switched access tandem transport (including any intermediate access provider charges for such services) for *all traffic* terminating to the LEC.[6] The LEC must also provide written notice to the Commission, all intermediate access providers that it subtends, and any IXC that it does business with: (1) that the LEC is engaged in access stimulation; (2) the name of the intermediate access provider the LEC will use to provide terminating switched access tandem switching and terminating switched

[6] *See Access Stimulation Order* at 9-10 ¶ 20; *see also id.* App. A (amending 47 C.F.R. § 51.914(a) to provide that access stimulating LECs will have to stop billing 45 days after a date that is 30 days after publication in the *Federal Register*).

access tandem transport services; and (3) that the LEC shall assume financial responsibility for those tandem switching and terminating transport services as of the date specified.[7]

2. Newly Adopted Definitions of "Access Stimulation" (Part 61)

In addition to retaining the Commission's previously adopted definitions of "access stimulation," the *Access Stimulation Order* adopts two new definitions/tests for determining whether certain carriers are engaged in access stimulation. Under the first newly adopted test, a CLEC will be deemed engaged in access stimulation if it has an interstate terminating-to-originating traffic ratio of at least 6:1 in an end office in a calendar month (with no evidence of a revenue-sharing agreement being required).[8] Under the second newly adopted test, a rate-of-return ILEC will be deemed engaged in access stimulation if it has an interstate terminating-to-originating traffic ratio of at least 10:1 in an end office in a three-calendar month period and has 500,000 minutes or more of interstate terminating minutes-of-use ("MOUs") per month in the same end office in the same three-month period (with no evidence of a revenue-sharing agreement being required).[9]

Any CLEC that meets the first newly adopted test will continue to be deemed engaged in access stimulation until its interstate terminating-to-originating traffic ratio falls below 6:1 for six consecutive months and it does not meet any other "access stimulation" test.[10] Any rate-of-return ILEC that meets the second newly adopted test will continue to be deemed engaged in access stimulation until its interstate terminating-to-originating traffic ratio falls below 10:1 for

7 *See id.* at 37 ¶ 82; *see also id.* App. A (amending 47 C.F.R. § 51.914(b)).
8 *See id.* at 19-20 ¶ 43; *see also id.* App. A (amending 47 C.F.R. § 61.3(bbb)(1)(ii)).
9 *See id.* at 19-20 ¶ 43; *see also id.* App. A (amending 47 C.F.R. § 61.3(bbb)(1)(iii)).
10 *See id.* at 24-25 ¶ 54; *see also id.* App. A (amending 47 C.F.R. § 61.3(bbb)(2)).

six consecutive months, its monthly interstate terminating MOUs fall below 500,000 for that same time period, and it does not meet any other "access stimulation" test.[11]

3. Additional Revisions Regarding Access Tariffs and Charges

If a CLEC meets any of the Commission's "access stimulation" tests, the carrier must revise its tariff to comply with the Commission's revised Part 51 rules within 45 days of commencing access stimulation or within 75 days of the promulgated rule's filing in the *Federal Register*, whichever is later.[12]

The Commission's *Access Stimulation Order* also amends Part 69 of the Commission's Rules to: (1) require access-stimulating ILECs to revise their tariffs to comply with the Commission's revised Part 51 rules within 45 days of commencing access stimulation or within 75 days of the promulgated rule's filing in the *Federal Register*, whichever is later;[13] and (2) prohibits access-stimulating LECs and the intermediate access providers subtending access-stimulating LECs from billing IXCs for terminating switched access tandem switching or terminating switched tandem transport charges for traffic terminating on the access-stimulating LECs' networks.[14]

ARGUMENT

I. THE CLECs ARE LIKELY TO PREVAIL IN THEIR APPEAL OF THE *ACCESS STIMULATION ORDER*

The first prong that the Commission considers in determining whether to stay the effectiveness of new regulations during the pendency of the appeal is the likelihood of success

11 *See id.* at 25 ¶ 55; *see also id.* App. A (amending 47 C.F.R. § 61.3(bbb)(3)).
12 *See id.* at 26-27 ¶ 58; *see also id.* App. A (amending 47 C.F.R. § 61.26(g)(3)).
13 *See id.* at 34 ¶ 74 *see also id.* App. A (amending 47 C.F.R. § 69.3(e)(12)(iv)).
14 *See id.* at 34 ¶ 75; *see also id.* App. A (amending 47 C.F.R. § 69.4).

on the merits.[15] Respectfully, Petitioners assert that the reviewing court of appeals is highly likely to vacate the *Access Stimulation Order* based on the following independent grounds.[16]

A. Appellate Standard of Review

A court of appeals reviewing the *Access Stimulation Order* will evaluate the Commission's order under the strictures of 5 U.S.C. § 706, which states in pertinent part:

> The reviewing court shall—
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.[17]

As demonstrated herein, the *Access Stimulation Order* is likely to be found unlawful pursuant to at least subsections (A), (B), (C), and (D).

B. The *Access Stimulation Order* Imposes New and Complex Regulations Without Notice

The *Access Stimulation Order* adopts two new, alternative tests for determining whether carriers are engaged in "access stimulation," neither of which were raised in the Commission's

---

15 *See, e.g.*, *TRS Services Stay Order*, 23 FCC Rcd. at 1706 ¶ 4.

16 In discussing the likelihood of success on appeal, Petitioners do not intend to waive any of the arguments previously presented to the Commission in the WC Docket No. 18-155, all of which are expressly incorporated herein and preserved.

17 5 U.S.C. § 706.

Notice of Proposed Rulemaking ("NPRM")[18] nor discussed in the record. These regulations are thus subject to being set aside pursuant to 5 U.S.C. § 706(2)(D).

1. The Recently Adopted 6:1 Ratio Test Has Been Adopted in Violation of the APA's Notice Requirements

As an initial matter, the *Access Stimulation Order* adopts a new test by which a CLEC will be deemed to be engaged in access stimulation if it has an interstate terminating-to-originating traffic ratio of at least 6:1 in a calendar month, even if there is no evidence of the CLEC being party to any revenue sharing agreements (the "6:1 ratio test").[19] This test, however, was not raised in the Commission's NPRM, and while the Commission asserts the 6:1 ratio test was proposed by Inteliquent[20] (an assertion that the CLECs and numerous other commenters dispute[21]), this alone would not meet the notice requirements imposed on the Commission under the Administrative Procedure Act ("APA"). "The APA requires interested parties wishing to play a role in the rulemaking process to comment on the *agency's* proposals, not on other interested parties' proposals."[22]

Moreover, the Commission's inclusion of the 6:1 ratio test in its Draft Order[23] does not cure this notice defect, as the courts have recently established that "providing a few weeks to review [a draft] order [before adoption by the Commission at its open meeting] … does not cure

---

18 *In the Matter of Updating the Intercarrier Comp. Regime to Eliminate Access Arbitrage*, Notice of Proposed Rulemaking, 33 FCC Rcd. 5466 (2018) ("Access Stimulation NPRM" or "NPRM").

19 *See Access Stimulation Order* at 19-20 ¶ 43; *see also id.* App. A (amending 47 C.F.R. § 61.3(bbb)(1)(ii)).

20 *See Access Stimulation Order* at 21 ¶ 47.

21 *See* CLEC September 19, 2019 *Ex Parte* Letter at 10; Letter from A. Nickerson, CEO, Wide Voice, LLC, to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 1-3 (Sept. 16, 2019).

22 *Citizens Telecomms. Co. of Minn., LLC et al. v. FCC*, 901 F.3d 991, 1006 (8th Cir. 2019) ("*Citizens*").

23 *See In re Updating the Intercarrier Comp. Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155, Report and Order and Modification of Section 214 Authorizations (circulated Sept. 5, 2019) ("Draft Order").

the harm from inadequate notice."[24] This is because "[t]he APA's procedural rules are designed to allow parties the opportunity for informed criticism and comments … and creating any exceptions to the procedural requirements would allow agencies to significantly alter the course of a proceeding without authorization."[25]

Here, it is irrefutable that industry participants, including Petitioners, have not been afforded the opportunity to submit informed criticism and comments on the 6:1 ratio test. Thus, these parties have been "prejudiced because any chance to make their case did not come from the FCC's notice."[26] The Commission's adoption of this test alone, then, violates the APA, and will result in Petitioners succeeding on the merits before the appellate court.

2. The Commission's 10:1 Ratio Test Has Also Been Adopted in Violation of the APA's Notice Requirements

While the Commission's Draft Order included one new test for determining whether carriers are engaged in "access stimulation,"[27] in the *Access Stimulation Order*, the Commission adopted a second new "access stimulation" test for rural rate-of-return LECs. These carriers will be deemed to be engaged in access stimulation if they have an interstate terminating-to-originating traffic ratio of at least 10:1 in a three-calendar-month period and with 500,000 minutes or more of interstate terminating MOUs per month in the same three-month period (the "10:1 ratio test").[28] This test was proposed verbatim by NTCA and AT&T in their September 20, 2019, *ex parte* comments to the Commission[29] – comments that were received only moments

---

24 *Citizens*, 901 F.3d at 1005-06.
25 *Id.* at 1005 (internal citations omitted).
26 *Id.* at 1006.
27 *See* Draft Order at 17-19 ¶¶ 41-46.
28 *See Access Stimulation Order* at 19-20 ¶ 43; *see also id.* App. A (amending 47 C.F.R. § 61.3(bbb)(1)(iii)).
29 Letter from M. Romano, Senior Vice President – Industry Affairs & Business Development, NTCA, and M. Nodine, Assistant Vice President – Federal Regulatory, AT&T Services, Inc., to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 1 (Sept. 20, 2019) ("NTCA and AT&T therefore

before the Commission's Sunshine Period, which kicked in seven days before adoption of the *Access Stimulation Order* and during which time no parties were allowed to submit further comments to the Commission.[30] Thus, Petitioners did not have a reasonable opportunity to comment on this proposal before the Docket was closed, creating a level of notice deficiency that defies even the most liberal reading of the APA and a clear basis for the *Access Stimulation Order* to be struck down by the appellate courts.[31]

C. The *Access Stimulation Order* Imposes Regulations that Are Arbitrary

Beyond violating the APA's notice requirements, Petitioners will likely succeed on the merits of their appeal because several of the Commission's actions through the *Access Stimulation Order* are arbitrary and/or capricious. First, in adopting the *Access Stimulation Order*, the Commission fails to address data establishing the true cost of access stimulation (or lack thereof) on all end user customers and fails to adequately support its conclusion that IXCs and their customers subsidize other customers' use of free conferencing services. Second, the Commission's newly adopted "access stimulation" tests lack the necessary evidentiary support and fails to define several critical terms. Third, the *Access Stimulation Order* reverses course from decades' old Commission policy on geographic rate averaging without providing a "reasoned explanation" for doing so.

---

suggested the following for determining whether an RLEC is engaged in access stimulation and for resolving any disputes or disagreements related thereto: As the Commission has an expectation that a rate of return ILEC will not engage in access stimulation unless its interstate traffic ratio exceeds 10:1 and its traffic volume exceeds 500,000 terminating interstate minutes per end office per month, both measured over three consecutive months.").

30 *See FCC to Hold Open Commission Meeting Thursday, September 26, 2019*, Public Notice, at 2 (Sept. 19, 2019).

31 *See* 5 U.S.C. § 553(b) ("General notice of proposed rule making shall be published in the Federal Register … [and such notice shall include] either the terms or substance of the proposed rule or a description of the subjects and issues involved.").

1. The *Access Stimulation Order* Fails to Consider Current Record Data and Evidence Regarding the "True Cost" of Free Conferencing Services and Relies on Arbitrary Conclusions

The Commission justifies its new access stimulation rules on the premise that the "IXCs that pay [] access charges generally spread those costs to all of their customers, regardless of which customers actually make calls to high-volume calling services," [32] and because "IXCs' customers will benefit from reduced access arbitrage."[33] However, in reaching these conclusions, the Commission does not address – and instead intentionally ignores – the data and statements in the record contradicting these conclusions. On numerous occasions, the CLECs commenting in this Docket presented data demonstrating that the Commission's 2011 complete reform of the access charge rules had not produced the promised results for American consumers. Despite entirely transforming and significantly lowering access charge rates in 2011, which produced hundreds of millions, if not more than a billion, dollars in savings for the nation's largest carriers,[34] American consumers today pay *more* – not less – for the long-distance service they receive than they did previously.[35] This evidence is entirely undisputed in the record, yet the Commission fails to explain why its prior predictions have proved wrong and offers no reasoned explanation for why giving AT&T and Verizon even more savings now, at the cost of rural LECs and millions of consumers, will produce a different result.

Moreover, the CLECs presented *verifiable data and other evidence* establishing that the long-distance charges paid by users of free conferencing services are, by themselves, entirely

---

32 *See Access Stimulation Order* at 2 ¶ 2.

33 *See id.* at 14 ¶ 32.

34 *See, e.g., id.* at 4-5 ¶ 23 (discussing hundreds of millions of dollars of savings just in reduced charges on access stimulation traffic alone)

35 *See In re Updating the Intercarrier Comp. Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155, Comments of Competitive Local Exchange Carriers, at 6-13 (July 20, 2018) ("CLEC Comments").

sufficient to cover the access charges paid by IXCs when delivering those customers' calls to free conferencing providers. Thus, the assertion that IXCs need to look to other IXC customers to "subsidize" customers' use of free conferencing services defies the record.[36] The only record evidence that has been presented clearly demonstrates that this conclusion – which underpins the Commission's entire basis for acting in this Docket – is either misplaced or simply erroneous. No commenters (including AT&T, Verizon, or any other IXC) ever provided data or evidence to contradict the CLECs' record evidence, yet the Commission adopts this rhetorical argument without requiring the IXCs to support their claims with data and while ignoring the clearly contradictory evidence. There is no clearer example of arbitrary and capricious rule making than when an agency fails to examine relevant data or offers "an explanation for its decision that runs counter to the evidence before the agency."[37]

Indeed, the Commission implicitly concedes the absence of record evidence to support the premise that non-users of these services must subsidize those that use them when it added, after the release of the Draft Order, this shocking justification for its new rules: "To the extent passthrough [of IXC savings to customers] does not occur, IXC shareholders are presently subsidizing users of access-stimulating services."[38] Petitioners respectfully submit that they have

---

[36] *See, e.g.*, Letter from D. Carter, Counsel, CLECs, to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 2-5 (May 13, 2019); Letter from D. Carter, Counsel, CLECs, to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 1 (Nov. 1, 2018); Letter from D. Carter, Counsel, CLECs, to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 2 (Oct. 2, 2018); *In re Updating the Intercarrier Comp. Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155, Reply Comments of Competitive Local Exchange Carriers, at 7-8 (Aug. 3, 2018); CLEC Comments at 21-26.

[37] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) ("[Courts may] set aside agency action that [fails to show that] the agency has 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action, including a rational connection between the facts found and the choices made.'") (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43); *Nader v. FCC*, 520 F.2d 182, 192 (D.C. Cir. 1975) ("Our function is not to impose our own standards of reasonableness upon the Commission, but rather to ensure that the Commission's order is supported by substantial record evidence and is neither arbitrary, capricious, nor an abuse of discretion.").

[38] *See Access Stimulation Order* at 14 ¶ 32.

a likelihood of successfully convincing an appellate court that the Commission's financial ruin of access-stimulating LECs and the purposeful eradication of a lawful business model to benefit the shareholders of Fortune 500 companies is capricious.

2. The *Access Stimulation Order*'s New "Access Stimulation Tests" are Arbitrary

Beyond the significant notice deficiencies that characterize the Commission's two new "access stimulation" tests, these tests are also arbitrary because their formulae were adopted absent a well-reasoned basis and without adequate evidence.

The Commission has not adequately explained why its new tests should be subject to 6:1 and 10:1 terminating-to-originating interstate traffic ratios for CLECs and rate-of-return LECs, respectively. With respect to the 6:1 ratio test, the Commission's entire basis for applying this ratio is premised on its belief that such a ratio "provides a clear indication that access stimulation is occurring, even absent a revenue sharing agreement" and because such a ratio is "twice the existing [3:1] ratio" applicable to CLECs with revenue-sharing agreements.[39] Yet, this statement does not explain why a carrier that terminates more traffic than it originates, but which has never engaged in revenue sharing, should be alleged an "access stimulator" when that terminating traffic could come from other businesses, such as call centers or major businesses that receive a high volume of terminating calls. Moreover, this statement does not explain why other ratios were not considered or why there should be such a discrepancy between the ratio applicable to CLECs and the ratio applicable to rate-of-return LECs (a ratio which itself is not premised on any underlying findings or evidence beyond the Commission's conclusory assertion that there is a "lack of evidence that rate-of-return LECs are currently engaged in access stimulation"[40]).

---

39 *See id.* at 21 ¶ 47.

40 *See id.* at 23 ¶ 50. Indeed, the Commission asserts that applying the 6:1 ratio test now applicable to CLECs would be unwarranted because "a small but significant number of rate-of-return LECs that are

Most crucially, the Commission does not explain why CLECs should have less opportunity to attract high volume end users, such as call centers, than the ILECs with whom they are supposed to compete. There is nothing more arbitrary than requiring competitors to compete without having the same freedoms, particularly when the Commission has already denied CLECs the right to obtain high-cost universal support specifically because they are supposed to be able to pick and choose the profitable clients that they desire to serve.[41]

As noted above, the Commission's two new "access stimulation tests" were adopted without adequate notice and opportunity for comment by other interested parties,[42] thereby once again preventing the Commission from enacting new regulations with the evidentiary and factual development required by the APA. As the Supreme Court has explained, agencies "must examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'"[43] Considering the complete lack of evidence with respect to either of these new "access stimulation" tests, the Commission is not able to meet the standard necessary for such a dramatic and historic change of direction.

---

apparently not engaged in access arbitrage would trip the 6:1 trigger." *Id.* But then why not adopt a 7:1 trigger or 8:1 trigger for ILECS? Why is the 10:1 trigger such a justifiable number? The Commission never addresses these concerns, taking AT&T's statements at their word without accepting other comments on the proposal and without independently exploring what terminating-to-originating ratio should apply.

41 *See In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 ¶ 864 (2011) ("*Connect America Fund Order*") ("We decline to provide an explicit recovery mechanism for competitive LECs…. [C]ompetitive LECs … typically can elect whether to enter a service area and/or to serve particular classes of customers (such as residential customers) depending upon whether it is profitable to do so without subsidy.").

42 *See supra* Section I.A.

43 *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (quoting, in part, *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

3. The *Access Stimulation Order* Abandons Prior Commission Policies Without Any Reasoned Explanation

As federal courts have consistently recognized, an agency's actions will be set aside as "arbitrary and capricious" if the agency fails to provide a "reasoned explanation" for its decision to change course.[44] Here, the Commission has imposed new regulations that run contrary to its decades' old geographic rate averaging requirement and the requirement's underlying policy, yet the agency fails to explain its basis for doing so beyond providing a one-sentence conclusory statement in a hidden footnote.[45]

As explained herein, the *Access Stimulation Order* will inevitably cause conferencing providers to move their services to larger urban carriers, where revenue sharing will still be a viable option. Conferencing providers who remain connected to rural carriers, however, likely will not be able to continue their revenue sharing relationship, meaning they will be forced to charge consumers for their conferencing services. Therefore, the cost of free conferencing to the consumer will differ depending on the geographic location of the conferencing provider, forcing the consumer to pay for both its long-distance plan and the conference service if the call is made to a rural area, while continuing to allow the consumer to only pay its long-distance charges if the call is routed to a larger urban carrier.

The Commission has consistently recognized the benefits of geographic rate averaging, noting that such a policy "furthers our goal of providing a universal nationwide telecommunications network and ensures that ratepayers share in the benefits of nationwide

---

44 *See, e.g.*, *CBS Corp. v. FCC*, 663 F.3d 122, 145 (3d Cir. 2011) ("[A]n agency cannot ignore a substantial diversion from its prior policies … but [instead must] justify its actions by articulating a reasoned analysis behind the change.").

45 *See* Access *Stimulation Order* at 34 ¶ 73 n. 241 ("The Joint CLECs argue that the rules adopted today are counter to the Commission's geographic rate averaging policy. The hypothetical they spin, that 'free' conference call service providers will move to urban areas, is purely speculative.").

interexchange competition."[46] Even where a carrier is engaged in access stimulation the Commission has noted that geographic rate averaging is of "paramount importance," and that the policy should protect "end-users placing calls to a stimulating entity" from paying more just because that entity is located in a rural, high-cost area.[47] As the Commission explained, "[c]ustomers initiating calls to access stimulating entities are generally unaware that their calls are part of an access-stimulation arrangement,"[48] and they are similarly unaware whether the free conferencing service they are calling into is located in an urban or rural area. Thus, under the Commission's own policy, whether a free conferencing service is placed in an urban or rural area, the ***total charge*** the consumer pays should be ***the same***.

With the Commission's *Access Stimulation Order* now adopted, consumers will incur different charges for the same service depending solely on the geographic location to which their call is routed. The Commission has failed to address this issue or why such a total and complete reversal from geographic rate averaging polices that were effective all the way back to the 1980s should now totally be forgotten. Asserting that these concerns are "speculative" in a single footnote is not enough;[49] the Commission "must justify its actions by articulating a reasoned analysis behind the change" if it desires to now divert from policies that it has consistently applied for thirty-plus years.[50] Thus, the Commission's failure to explain this policy reversal

---

46 *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 11 FCC Rcd. 9564, 9567 ¶ 6 (1996) (quoting *In re Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd. 2873, 3132 (1989)).

47 *In re Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 4554, 4763 ¶ 654 (2011).

48 *Id.*

49 *See Access Stimulation Order* at 34 ¶ 73 n. 241.

50 *See CBS Corp.*, 663 F.3d at 145.

more significantly and fully presents another basis upon which Petitioners will succeed in their appeal.

D. The *Access Stimulation Order* Exceeds the Commission's Authority

It is axiomatic that when a regulatory agency adopts rules that exceed its statutory jurisdiction, a reviewing court must vacate the agency's action.[51] The *Access Stimulation Order* exceeds the Commission's jurisdiction in multiple respects. *First*, the Commission interferes with the states' authority under Section 252(d) to determine carriers' network "edge," and improperly defines the network "edge" outside of its ongoing docket proceeding related to that specific issue. *Second*, the Commission unreasonably and unlawfully discriminates against rural CLECs and ILECs. *Third* the Commission violates the Fifth Amendment's Takings Clause, eliminating access stimulation as a revenue stream for the CLECs but providing no realistic alternative means of compensation for them

1. The *Access Stimulation Order* Interferes with States' Authority to Determine the Network Edge for Carriers

While the Tenth Circuit has determined that the Commission has the authority to establish bill-and-keep as a "pricing methodology" for access stimulation traffic, it may *not* interfere with the states' Section 252(d) authority to (i) arbitrate "[c]harges for the transport and termination of traffic" where carriers cannot agree on such charges; or (ii) determine carriers' network "edge."[52] Indeed, as the Tenth Circuit explained, "subsection [252](d) preserves state arbitration authority over [transportation and termination] charges" and the "terms and conditions" related thereto.[53] One of the "terms and conditions" that the states retain jurisdiction

---

51 *See* 5 U.S.C. § 706(2)(C).
52 *In re FCC 11-161*, 753 F.3d 1015, 1125-27 (10th Cir. 2014).
53 *Id.* at 1126.

over, even after the implementation of a bill-and-keep framework, is the determination of each carrier's network "edge":

> Under Section 252(d)(2), states continue to enjoy authority to arbitrate "terms and conditions" in reciprocal compensation. For example, ***even under bill-and-keep arrangements, states must arbitrate the "edge" of carriers networks. This reservoir of state authority can be significant.***
>
> The "edge" of a carrier's network consists of the points "at which a carrier must deliver terminating traffic to avail itself of bill-and-keep." ***The location of the "edge" of a carrier's network determines the transport and termination costs for the carrier***.[54]

Under the new rules imposed by the *Access Stimulation Order*, access-stimulating LECs will be forced to pay for the transportation of all terminating traffic from the IXC's POP to the local carrier's central office in *all* circumstances. This will create a new network "edge," establishing the IXC's POP as the "edge" of the CLEC's network. Such a proposal clearly violates the Tenth Circuit's determination that, under Section 252(d), *states – not the Commission* – are authorized to determine carriers' network "edge" for the purpose of instituting bill-and-keep.[55]

Moreover, such a policy contravenes the Commission's own independent determinations about when and how the network "edge" should be determined pursuant to the Commission's Rules. The Commission has previously refused to address its network "edge" rules outside of its ongoing rulemaking proceeding on that issue,[56] determining that an independent imposition of

---

54 *Id.* (emphasis added).

55 Indeed, statutory provisions are in line with the Tenth Circuit's determination and implicitly signal that the states retain authority over the charges, terms, and conditions associated with the transport and termination of traffic to rural local exchange carriers, including the authority to determine carriers' network "edge" where carriers cannot reach agreement. *See, e.g.*, 47 U.S.C. § 251(f)(1)(B) ("The party making a bona fide request of a rural telephone company for interconnection, services, or network element shall submit a notice of its request to the State commission.").

56 *See Parties Asked to Refresh the Record on Intercarrier Comp. Related to the Network Edge, Tandem Switching and Transport, and Transit*, WC Docket No. 10-90, CC Docket No. 01-92, Public Notice, 32 FCC Rcd. 6856 (2017).

new tandem switching and transport obligations effectively imposes network "edge" rules and network "edge" classification without proceeding through the proper administrative channels.[57] This is effectively what the Commission has done here, thereby violating its own conclusions about the processes that *must* be followed before it revises its network "edge" rules.

2. The *Access Stimulation Order* Unreasonably Discriminates Against Access-Stimulating LECs

The *Access Stimulation Order* also unreasonably discriminates against access-stimulating LECs in violation of Section 202(a) and Section 251(b)(5).

The Commission has previously considered proposals to treat access stimulation traffic in a discriminatory manner, but on each occasion it has expressly refused to do so.[58] Moreover, where the Commission has determined that discriminatory treatment is permissible, it has only done so with the support of substantial evidence and a reasoned decision-making process that complies with the APA and federal precedent. The Commission's order violates these statutory commands, as such a rule *intentionally* discriminates against one type of traffic – and two types of carriers – without adequate explanation or justification and to such a degree that one of the

---

[57] *See In re Level 3 Commc'ns v. AT&T Inc. et al.*, Memorandum Opinion and Order, 33 FCC Rcd. 2388, 2395-96 (2018) ("Level 3 asserts, incorrectly, that the *Transformation Order* fully addressed the transition to bill-and-keep for tandem switching and transport traffic that a price cap carrier hands off to a non-price cap carrier affiliate for termination. Level 3's argument assumes that the Commission has already established the network edge for this traffic at the price cap carrier's tandem and that, under the existing rule, price cap carriers are expected to recover their tandem switching and transport costs from their CMRS or VoIP affiliates' end users. But the accompanying *FNPRM* and the *2017 Public Notice* demonstrate that the Commission has not yet addressed these issues and is still actively considering them. The *FNPRM* and the *2017 Public Notice* sought comment on the definition of the network edge and the appropriate transition for tandem switching and transport traffic when a price cap carrier does not own both the tandem and the end office switches. We therefore agree with AT&T that applying the rule to AT&T CMRS or VoIP affiliates would effectively impose bill-and-keep and "network edge" rules on such traffic, notwithstanding the Commission's decision to seek further comment on those issues.") (footnotes omitted).

[58] For example, when AT&T and Sprint argued in favor of complete detariffing in 2011, the Commission elected to "reject the suggestion" and instead implement the current regulatory framework. *See Connect America Fund Order*, 26 FCC Rcd. 17663 ¶ 692.

Commissioners expressed publicly his concerns that the new rules may violate the Telecommunications Act.[59]

Here, the Commission has elected to discriminate against access stimulation traffic and impose two new "access stimulation" tests for rural CLECs and rate-of-return LECs without presenting current, relevant, and corroborative evidence to support its findings and bases for these new rules. Moreover, it has elected to apply distinct tests for CLECs and rate-of-return ILECs using different terminating-to-originating traffic ratios, but has neglected to explain *why* such a distinction is necessary despite the fact that both types of carriers will compete for the same type of call center and business traffic. As noted above, these proposals were adopted at the last minute and, similar to the Commission's findings in 2011, do not provide the necessary proof to unjustly and unreasonably discriminate against these classes of carriers. The Commission has thus overstepped its authority (again), and its *Access Stimulation Order* will be struck down because of it.

Moreover, now that access traffic is governed by Section 251(b)(5), the Commission has authority to impose bill-and-keep (or this modified version of it) only if it provides "reciprocal compensation."[60] As the Commission has previously articulated, the reciprocal elimination of access charges produces that result. But, imposing new costs only on access-stimulating LECs yields no reciprocal benefits for those carriers, and thus contradicts the mandate of Section 251(b)(5).

---

[59] *See Access Stimulation Order* (Statement of Comm'r. O'Rielly) ("I do worry that delineating between rural local exchange carriers (LECs) and competitive LECs runs counter to the sprit, if not the letter, of the Telecom Act. Moreover, I have concerns over the particulars of this line-drawing effort and suspect that it will need to be revised in the future.") ("O'Rielly Statement on *Access Stimulation Order*").

[60] 47 U.S.C. § 251(b)(5).

As one Commissioner has already acknowledged, the *Access Stimulation Order* likely violates the Telecommunications Act and the Commission's "line-drawing efforts" provides a reason for concern.[61] Thus, Petitioners have demonstrated a likelihood of success on the merits.

3. The *Access Stimulation Order* Violates the Fifth Amendment's Takings Clause

Under the Fifth Amendment's Takings Clause, "private property" may not be "taken for public use" without "just compensation."[62] The Supreme Court has explained that, "the purpose of the Takings Clause … is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[63] "There is no doubt" that property interests "besides land ownership" are "also protected by the Fifth Amendment."[64] And federal courts have repeatedly found unconstitutional takings when government regulations deprive business owners of significant, expected revenue streams associated with their property.[65]

The *Access Stimulation Order* sounds the death knell for the CLECs that have lawfully abided by the Commission's 2011 access stimulation rules, and, in turn, violates the Fifth Amendment. These businesses, relying on preexisting access stimulation regulations, invested

---

61 *See* O'Rielly Statement on *Access Stimulation Order* ("I do worry that delineating between rural local exchange carriers (LECs) and competitive LECs runs counter to the sprit, if not the letter, of the Telecom Act. Moreover, I have concerns over the particulars of this line-drawing effort and suspect that it will need to be revised in the future.").

62 U.S. Const. amend. V.

63 *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 616-17 (2001)).

64 *Yancey v. United States*, 915 F.2d 1534, 1540 (Fed. Cir. 1990); *accord Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (determining that the Fifth Amendment protected an intangible property interest in a trade secret).

65 *See, e.g.*, *Yancey*, 915 F.2d at 1542 (finding a taking when turkey farmers were forced to sell flock for slaughter after quarantine); *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 43 (1999) (holding that landowners could recover when denied dredge and fill permit); *Formanek v. United States*, 26 Cl. Ct. 332, 335 (1992) (holding that landowners could recover when denied discharge permit).

substantial resources in high volume services.[66] In a 75-day span, the Commission's newly adopted regulations will both wipe out the value of those investments and prevent CLECs from operating as financially viable enterprises.[67] Because the *Access Stimulation Order* eliminates access stimulation as a revenue stream for CLECs and ILECs, and provides no realistic alternative means of compensation for them,[68] it violates the Takings Clause of the Fifth Amendment.[69]

As the foregoing discussions make clear, Petitioners are likely to prevail on the merits of their appeal, a factor that strongly weights in favor of granting the requested stay.[70]

II. PETITIONERS WILL SUFFER IRREPARABLE HARM ABSENT A STAY

Petitioners also amply satisfy the second prong of *Virginia Petroleum Jobbers* because they will suffer irreparable harm if the *Access Stimulation Order* becomes effective.

The harm that Petitioners will suffer if the *Access Stimulation Order* becomes effective prior to appellate review is of several types: (1) Petitioners will be totally deprived of the very revenue that allows them to exist, resulting in their financial ruin and bankruptcy; (2) Petitioners will lose significant portions of their customer base, resulting in a loss of corporate goodwill and market share; (3) Petitioners will be subject to multiple, potentially endless disputes with IXCs

---

66 *See, e.g.*, Declaration of Joshua Dean Nelson on Behalf of Great Lakes Communication Corporation ¶ 3 ("GLCC Declaration"); Declaration of James Groft on Behalf of Northern Valley Communications, LLC ¶ 3 ("NVC Declaration").

67 *See, e.g.*, GLCC Declaration ¶¶ 7-9, 11-14, 16; NVC Declaration ¶¶ 6-8, 11-14, 16.

68 *See, e.g.*, GLCC Declaration ¶ 15; NVC Declaration ¶ 15.

69 At a minimum, the Commission has not engaged in "ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances," which are a necessary prerequisite to a decision with ramifications under the Takings Clause. *Murr*, 137 S. Ct. at 1942 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)); *accord Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1181-82 (D.C. Cir. 1987) (en banc) (remanding FERC rate order because FERC failed to make sufficient factual findings to establish whether rate order amounted to unconstitutional taking).

70 *See, e.g.*, *In re Charter Commc'ns Entm't I, LLC*, 22 FCC Rcd. at 13892 ¶ 4 ("If the petitioner makes a strong showing of likely success on the merits, it need not make a strong showing of irreparable injury.") (citing *Cuomo v. NRC*, 722 F.2d 972, 974 (D.C. Cir. 1985)).

regarding their terminating-to-originating interstate traffic ratios (and thus their financial responsibility – or lack thereof – under the Commission's new rules); and (4) Petitioners will be stuck with the Herculean task of revising their tariffs and billing arrangements over a short period of time, taking away more resources from their daily operations and duties to their subscribers.

A. The *Access Stimulation Order* Will Financially Ruin Petitioners

The new regulations imposed by the *Access Stimulation Order* will be financially ruinous to Petitioners, depriving them of the opportunity to generate the revenues necessary to keep their businesses afloat. Indeed, Petitioners already have enough trouble turning a profit under the Commission's 2011 access stimulation regulations while providing competitive services in high cost areas without the subsidies received by their competitors.[71] If the Commission's *Access Stimulation Order* takes effect, Petitioners' financial hardships will be severely compounded, bringing down upon them new financial responsibilities that will totally eviscerate their revenue streams and bring about their insolvency.

If Petitioners choose to retain their high-volume customers, the Commission's new access stimulation regulations will cause Petitioners to go from successful to bankrupt within less than a year. For example, based on existing traffic volumes and rates, Petitioner Great Lakes Communication Corporation estimates that, had the *Access Stimulation Order* been in effect throughout 2019, rather than making a **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** profit, the carrier would have suffered a loss of more than **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** for the period ending August 31, 2019.[72] For Petitioner Northern Valley Communications, LLC, the result would be equally

71 *See* NVC Declaration ¶ 5.
72 *See* GLCC Declaration ¶ 8.

catastrophic, causing the carrier to suffer a loss of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** – a much more significant loss than **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** under which the carrier is currently operating.[73]

But even if Petitioners were to terminate their relationships with the high-volume customers, the same harsh result would occur, as Petitioners would be forced to continue paying the costs associated with tandem switching and transport for a six-month period – costs that, by themselves, would result in financial loss. Moreover, Petitioners could not look elsewhere for support or subsidies during this period or afterwards, as the Commission has made Petitioners ineligible for the types of high cost support that rural carriers need to receive to maintain their financial viability.[74]

Clearly, unless a stay is granted, Petitioners will be forced to bear substantial costs complying with rules that are unsustainable as a matter of law and sound policy, and such costs on their own constitute irreparable injury that warrants a stay of the *Access Stimulation Order*.[75] Here, though, the danger of irreparable harm runs much deeper, as the regulations adopted "threaten[] the very existence of the movant's business," which will occur almost immediately absent a stay.[76] Destruction of a business in its current form has previously been deemed a basis

---

73 *See* NVC Declaration ¶¶ 5, 7.

74 *See* GLCC Declaration ¶ 15; NVC Declaration ¶ 14.

75 *See, e.g.*, *Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016) (finding that regulatory compliance costs are sufficient to establish irreparable injury where no mechanism exists to recover such costs should the challenged rule be invalidated); *In re Hickory Tech Corp. and Heartland Telecomms. Co.*, Order, 13 FCC Rcd. 22085 ¶ 3 (1998) (finding irreparable injury in circumstances where denial of stay would cause expenditure of "substantial resources that would be unnecessary … if Petitioners later were to succeed in their Application for review")

76 *See Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

upon which irreparable harm is found,[77] and because such an essential economic injury will fall upon Petitioners here,[78] this Petition should be granted.

B. The *Access Stimulation Order* Will Endanger Petitioners' Customer Base and Goodwill

The irreparable injury Petitioners face will, of course, extend beyond the complete destruction of their internal business operations and revenue streams. Indeed, if Petitioners lose their operating funds, they will also likely lose future business opportunities and their current customer bases – residential, business, and high-volume alike.

As explained below and in the attached Declarations, when Petitioners lose their revenue they will also lose their ability to maintain and improve their local telecommunications networks, which their local communities have come to rely on.[79] Inevitably, then, Petitioners' networks will be struck with technical difficulties and may additionally force Petitioners to stop providing innovative service offerings, such as broadband service and business connections. Once these technical difficulties start occurring on a more frequent basis, customers, as they often do, will become upset with their service and begin to look elsewhere for competitive, more capable offerings. For example, Petitioners' residential customers may cut their landlines or switch to a different broadband provider; business customers may do the same thing. The Petitioners' high-volume customers will also abandon these rural networks,[80] choosing instead to site their conferencing services in larger cities where they will be able to continue providing their services for free.

---

77 *See, e.g.*, *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (affirming lower court's order staying a permanent injunction and concluding that the "destruction [of the petitioner's business] in its current form" absent a stay is an "irreparable harm" favoring the grant of a stay).

78 *See* GLCC Declaration ¶¶ 7-9, 11-14, 16; NVC Declaration ¶¶ 6-8, 11-14, 16.

79 *See* GLCC Declaration ¶ 16; NVC Declaration ¶ 10.

80 *See* GLCC Declaration ¶ 10; NVC Declaration ¶ 10.

Consequently, then, the *Access Stimulation Order* will negatively affect Petitioners' corporate goodwill and its market share, leaving them with a dwindling subscriber base that will never recover and that will tack on to Petitioners' financial harm. The loss of these business opportunities and the adverse impact of the new rules on subscriber growth and retention cannot be adequately recouped in the future, and because loss of market share and goodwill constitute irreparable harm,[81] the Commission's *Order* should be stayed.

C. The *Access Stimulation Order* Subjects Petitioners to Multiple, Potentially Endless IXC Disputes Regarding Traffic Ratios

Under the newly adopted tests for "access stimulation," Petitioners will likely become subject to repetitive disputes and nonpayment scenarios, even where they no longer violate the respective 6:1 or 10:1 interstate traffic terminating-to-originating ratios. According to the *Access Stimulation Order*, the Commission encourages "[IXC] self-policing of our access stimulation definition and rules," and will allow IXCs to issue disputes to carriers based on the originating and terminating traffic data available to them.[82] With respect to Petitioners, historically, many of these carriers have sent a majority of their originating traffic through a single interexchange carrier (a product of their rural geographic location).[83] Thus, no other interexchange carrier would have any basis to understand each CLEC's true terminating-to-originating ratio. Yet, due to the Commission's encouragement of self-policing by *all* IXCs, other carriers will still be able to dispute these CLECs' ratios based on the skewed data available to them, resulting in

---

81 *See, e.g., Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) ("[W]hen the failure to grant preliminary relief creates the possibility of … the loss of goodwill, the irreparable injury prong is satisfied."); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) ("[L]oss of market share constitutes irreparable harm."); *see also BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., LLC*, 425 F.3d 964, 970 (11th Cir. 2005) ("[T]he loss of customers and goodwill is an irreparable injury.").

82 *Access Stimulation Order* at 27 ¶ 59.

83 *See, e.g.*, GLCC Declaration ¶ 12; NVC Declaration ¶ 12.

nonpayment schemes and self-help strategies that far surpass those that occurred under the Commission's 2011 access-stimulation rules.

As a result of the *Access Stimulation Order* and IXC "self-policing," Petitioners will be left with no choice but to spend the significant time and energy to defend these actions in hopes of receiving even some miniscule form of payment that they can feed into maintaining their networks. The burden that these disputes impose cannot be overstated. They require the submission and exchange of reams of traffic data, as well as expert analysis and competent legal and regulatory counsel. As noted above, Petitioners have been subject to similar disputes in the past and have regularly paid millions of dollars and hundreds of hours of internal manpower on individual cases. For example, with respect to a single access charge dispute between GLCC and AT&T, GLCC spent **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**.[84] The carrier's employees were also forced to dedicate hundreds of man hours to reviewing and producing GLCC data related to these disputes during that same time period.[85] NVC similarly pays significant amounts to resolve IXC-brought legal challenges, spending **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** on a single access charge dispute and also requiring its employees to dedicate hundreds of man hours in hopes of recovery payments it was rightfully owed.[86]

To handle the numerous disputes that the *Access Stimulation Order* will cause, Petitioners would need to hire the necessary internal and outside human resources, which would likely significantly exceed those amounts Petitioners have faced to date.[87] In a word, the *Access Stimulation Order* has created a regulatory morass, the likes of which have not been seen to date,

84 *See* GLCC Declaration ¶ 13.
85 *See id.*
86 *See* NVC Declaration ¶ 13.
87 *See* GLCC Declaration ¶ 13; NVC Declaration ¶ 13.

and which will immediately impose enormous, unrecoverable costs if permitted to go into effect. For this additional reason, Petitioners will suffer irreparable harm absent a stay.

D. Petitioners Will Be Unable to Revise Their Tariffs and Billing Arrangements in the Allotted Period

As the Commission makes clear in its *Access Stimulation Order*, its newly adopted rules will require access-stimulating LECs to revise their tariffs to ensure conformance with their new tandem switching and transport obligations.[88] Moreover, the rules' implementation will require significant and sudden alterations in the CABS billing arrangements of these LECs, which can only be implemented with the assistance of the LECs' billing providers and the intermediate/CEA providers they subtend.[89] These tariffs and billing arrangements are hugely complex, especially for rural carriers of the size affected by the *Access Stimulation Order*, like Petitioners.

The time it will take to ensure Petitioners' entire tariffs comply with the *Order* and to ensure compliance with Petitioners' other newly imposed duties will be Herculean and will similarly require Petitioners to take on additional cost burdens that they never before envisioned. Indeed, GLCC estimates that it will take hundreds of man hours to complete the analysis and amendment of its tariff and to notify all necessary third parties of its responsibilities under the new access stimulation rules.[90] NVC is similarly concerned.[91]

---

88 *See Access Stimulation Order* at 27 ¶ 58.

89 Beyond substantially harming the LECs, the revised billing policies the *Access Stimulation Order* has wrought will create substantial difficulties for intermediate providers and CEA providers, who will have to shift billing to LECs from IXCs. Modifying the older billing systems these providers utilize will require significant reprogramming that cannot be done overnight, if at all, because they were designed to assess CABS invoices to IXCs. As a result, substantial and expensive updates to these systems would need to be made extremely quickly to ensure proper billing under the Commission's newly adopted rules. This, of course, would result in significant financial disruptions for these businesses in a very brief period of time.

90 *See* GLCC Declaration ¶ 14.

91 *See* NVC Declaration ¶ 14.

Beyond the sheer costs these new regulations impose is the speed with which change is required. Indeed, seventy-five days is simply not long enough for Petitioners to make these changes along with the numerous other reporting requirements and financial responsibilities described above, and Petitioners' failure to make these changes during the required period will inevitably open them up to even greater risks of enforcement actions and IXC disputes, overburdening them even further and causing more irreparable financial harm to their businesses.

III. THIRD PARTIES WILL NOT BE HARMED BY A STAY

With regard to the third prong of *Virginia Petroleum Jobbers*, IXCs, their customers, and rural end users will not be harmed by a stay of the *Access Stimulation Order*. Indeed, while IXCs claim that they are financially harmed by rural carriers engaging in access stimulation, the evidence available in the record establishes that these carriers *profit substantially* from terminating this traffic.[92] Moreover, any assertions of harm the IXCs have made to date are conclusory at best, having never been qualified or verified with data or evidence. At bottom, maintaining the *status quo* pending appeal will actually allow IXCs to continue their profit-making. Moreover, as the record shows, numerous IXCs are already withholding payment from access-stimulating CLECs for the switched access services they provide,[93] such that a stay will merely retain the *status quo* for carriers on both ends.

Furthermore, any alleged harm to the IXCs due to a stay is countenanced by the fact that the IXCs' customers will not be harmed by a stay, as they will be able to continue making conference calls to the various service providers that they have relied on for years. Rural end user customers will also benefit, rather than suffer harm, as the access-stimulating CLECs whom they subscribe to will be able to continue providing them with the advanced telecommunications

92 *See, e.g.*, CLEC Comments at 22-24.
93 *See, e.g.*, *id.*; *see also id.* at 52-53.

services that they have come to expect, and which will be substantially harmed by the new rules coming into effect.

Indeed, the drastic, almost immediate financial obligations that the *Access Stimulation Order* imposes on Petitioners, coupled with the danger of decreased competition and Petitioners' financial ruin, pose a much greater harm to the public than would a stay pending review. The new regulations imposed by the *Access Stimulation Order* may seem attractive at first blush, but the competitive and operational repercussions would quickly overshadow them.

IV. THE PUBLIC INTEREST FAVORS A STAY

Finally, a stay will satisfy the fourth prong of *Virginia Petroleum Jobbers* because the public interest will gravely be impaired if the *Access Stimulation Order* becomes effective. As Petitioners previously noted, those end users who subscribe to the advanced communications services offered by Petitioners will likely suffer significant call disruptions and call failures when the newly adopted rules become effective,[94] as a 75-day window will not provide Petitioners with the time they need to prepare for the significant call path alterations that are about to occur. The negative effect of the *Access Stimulation Order* will extend even further, though, as the newly adopted rules will effectively prohibit Petitioners from accepting new business opportunities from legitimate traffic sources, such as call centers or major business centers, thereby bringing harm to Petitioners entire communities.

A. End Users Will Be Subject to Significant Call Disruption and Call Failures Under the *Access Stimulation Order*

Under the *Access Stimulation Order*, the Commission's newly adopted rules take effect 75 days after their publication in the *Federal Register*.[95] Over this 75-day period, Petitioners

---

94 *See* CLEC September 19, 2019 *Ex Parte* Letter at 9; *see also* GLCC Declaration ¶ 18; NVC Declaration ¶ 17.

95 *See Access Stimulation Order* at 34 ¶ 74.

will have to fundamentally alter their business and traffic models to conform to the Commission's newly adopted regulations and prepare for the financial hardship they are about to incur. For example, if Petitioners choose to continue siting free conferencing traffic for the benefit of their end-user customers, they will need to prepare for the immediate shift of traffic back to the CEA networks they sit behind, which lack the sufficient capacity to handle the traffic that will inevitably flow through them. And if Petitioners choose to leave the free conferencing business, they will need to take immediate action to terminate the delivery of traffic to their high-volume customers, but nonetheless will still be stuck paying for tandem switching and transport for a six-month period,[96] during which time their businesses will operate at a loss, impeding their ability to respond to and solve call problems and other issues in an efficient manner. Under either of these scenarios, end users will be significantly harmed once the newly adopted rules go into effect.

Where free conferencing continues and significant capacity does not exist on the CEA network, the network will quite literally overflow, causing a massive breakdown of both calls to free conferencing services *and* to those rural citizens and businesses that subscribe to Petitioners' networks. This could prevent critical calls from reaching their intended recipients and produce economic harm and lost business opportunities. These issues would remain present for months, if not years, as new trunks are added to handle the unexpected rise in call volume.

Of course, even if Petitioners decided to immediately exit the access stimulation business, problems would remain, as Petitioners would still be required to bear the financial cost of tandem switching and transport for a period of six months, costing them significant amounts of money and forcing them to cut costs to try to stay afloat. As an initial matter, then, those hundreds of

96 *See id.* at 25 ¶ 54.

thousands of end users who rely on free conferencing services will suffer call disruptions, as the lines to those services will be cut, leaving them without the calling services that have benefitted nonprofits, small businesses, religious institutions, political campaigns, and immigrant populations, among others.[97] End users subscribing to Petitioners may also, however, still suffer call failures and other call problems, as the Petitioner they subscribe to will have to operate at a loss for at least a six-month period, during which time it will likely have fewer resources to quickly respond to and resolve call problems and other network issues.

B. The *Access Stimulation Order* Will Inevitably Force Petitioners to Forego Much Needed Business Opportunities, Hurting Their Communities in the Process

Beyond harming end users who subscribe to Petitioners, the *Access Stimulation Order* will also harm the rural communities that these Petitioners do business in. Indeed, given the Commission's two new access stimulation tests, Petitioners must now worry that they will be deemed an access stimulator even if they do not have a relationship with any high-volume service provider. This worry will unfortunately make them extremely conservative in the business deals they elect to enter into and likely will force them to reject offers to host traffic for call centers and business headquarters, two customer groups whose terminating traffic volumes often far surpass their originating volumes.[98] Inevitably, this will harm the rural communities Petitioners are located in, as their inability to provide telecommunications service could lead business prospects to locate elsewhere (and likely in more urban areas, where the terminating-to-originating traffic ratios of carriers are much more in step), taking away jobs that rural Americans desperately want – and need.

---

97 *See*, e.g., Letter from D. Carter, Counsel, CLECs, to M. Dortch, Secretary, FCC, WC Docket No;. 18-155, at 2 (Oct. 2, 2018); *see also id.* Exh. A.

98 *See* GLCC Declaration ¶ 17.

CONCLUSION

For all these reasons, the Commission should stay the effectiveness of the *Access Stimulation Order* as it applies to Petitioners until the forthcoming appeal from that order is resolved. Petitioners respectfully request that this Petition be resolved by **October 18, 2019**.

October 4, 2019

G. David Carter
John Nelson, Jr.
WOMBLE BOND DICKINSON (US) LLP
1200 Nineteenth Street, N.W.
Suite 500
Washington, D.C. 20036
Tel: (202) 857-4593
Fax: (202) 261-0083
Email: David.Carter@wbd-us.com
John.Nelson@wbd-us.com

CERTIFICATE OF SERVICE

I hereby certify on this 4th day of October 2019 that the foregoing Petition for Stay of Report and Order Pending Appeal was served via email on the following persons:

Marlene H. Dortch
Secretary
Marlene.Dortch@fcc.gov

Chairman Ajit Pai
Federal Communications Commission
Ajit.Pai@fcc.gov

Commissioner Jessica Rosenworcel
Federal Communications Commission
Jessica.Rosenworcel@fcc.gov

Commissioner Brendan Carr
Federal Communications Commission
Brendan.Carr@fcc.gov

Commissioner Geoffrey Starks
Federal Communications Commission
Geoffrey.Starks@fcc.gov

Commissioner Michael O'Rielly
Federal Communications Commission
Mike.Orielly@fcc.gov

/s/ David Carter
G. David Carter